PART 2018 - GENERAL

Subpart F - Availability of Information

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PART 2018 - GENERAL

Subpart F - Availability of Information

§2018.251 General purpose and scope.

The Congressional policy behind the Freedom of Information Act (FOIA) (see Exhibit A of this subpart, which is available in any FmHA office) was to encourage public access to Federal agency information, unless specifically exempted by the Act, and to provide an avenue for any person to pursue their statutory rights by eliminating Administrative barriers, the removal of which would normally require expensive litigation. The FOIA, however, does not apply to the Congress, the Federal Courts, or units within the Executive Office of the President, whose sole function is to advise and assist the President. The FOIA is intended to provide access to documents or other information-bearing materials which:

(1) were created or obtained by the Farmers Home Administration (FmHA); (2) are, at the time of the request, within both the possession and control of the FmHA; and (3) restricted only as set forth in $\S\S2018.255$ and 2018.258 of this subpart.

§2018.252 Delegation of authority and available assistance.

Subject to the provisions of §2018.259 of this subpart, the Freedom of Information Officer (FOIO), Freedom of Information/Privacy Act Specialist, Management Analyst in the National Office, each State Director, each State Administrative Officer/State Administrative Program Chief, District Director, and County Supervisor is authorized to act, respectively, at the National, State, District, and County level on behalf of FmHA on all requests for materials and records. State Administrative Officers and Program Chiefs in each State Office will provide administrative and technical support regarding FOIA and Privacy Act matters to field offices. All employees are advised that assistance is readily available upon request from their State Office and the National Office. (Revised 01-26-94, PN 218.)

§2018.253 <u>Denials</u>.

Contact the FOIO, National Office, telephone number (FTS) 382-9638, before making a written denial of any request for information if you are not familiar with the specific exemption to be cited as a basis for the denial. When information is denied from disclosure pursuant to the FOIA or Privacy Act, the following three criteria must be met when responding to the requester:

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- (a) Identify the nature of the denied information.
- (b) Cite an appropriate FOIA/Privacy Act exemption for its denial.
- (c) Provide for an appeal of the denial to the Administrator.

§2018.254 Penalties and court review.

Upon receipt of a complaint based upon a final denial of information by the Agency, a U.S. District Court can order the production of any Agency records that were improperly withheld from the requester and may also award attorney's fees and costs. In the event the FmHA employee fails to comply with the District Court's order to release records, the court may punish the employee for contempt of court. When a court issues a written finding that the circumstances surrounding the withholding raises questions whether an Agency employee acted arbitrarily or capriciously with respect to the withholding, the Office of Personnel Management (OPM) will determine if disciplinary action is warranted against the employee. If the OPM determines that disciplinary action is warranted, the Administrator will be so advised and he/she must take the corrective action recommended.

§2018.255 Fees.

The fees set forth are based upon guidelines prescribed by the Office of Management and Budget (OMB), published at 52 FR 10012 (March 27, 1987), and the fee waivers set forth are based upon guidelines prescribed by the Office of Legal Policy, U.S. Department of Justice, dated April 2, 1987. This section adopts the Fee Schedule and procedures prescribed by the Office of the Secretary, U.S. Department of Agriculture (USDA), Appendix A to 7 CFR, part 1, Subpart A, published at 52 FR 49383 (December 31, 1987).

(a) <u>Instances in which fees may not be charged</u>.

- (1) No charge shall be made for the first 100 pages of duplicated information $(8-1/2" \times 14"$ or smaller-size paper), or the first two hours of manual search time, or the equivalent value of computer search time as defined in paragraph (d)(1)(ii) of this section, except on requests seeking documents for a commercial use, as specified in paragraph (b)(1) of this section.
- (2) No charge shall be made--even to commercial use requesters--if the cost of collecting a fee would be equal to or greater than the fee itself. For FmHA, this figure has been calculated to be \$25.00.

- (3) Fees may not be charged for time spent by an FmHA employee in resolving legal or policy issues, or in monitoring a requester's inspection of FmHA records. No charge shall be made for normal postage costs.
- (4) No charge shall be made when filling requests from other Departments or Government agencies for official use, provided quantities requested are reasonable in number.
- (5) When members of the public provide their own copying equipment, no copying fee will be charged (although search and review fees may still be assessed).
- (6) Fees may not be charged when any notices, decisions, orders, or other materials are required by law to be served on a party in any proceeding or matter before any Department agency.
- (b) <u>Levels of fees for each category of requesters</u>. Under the FOIA, as amended, there are four categories of requesters: commercial use requesters; educational &nd non-commercial scientific institutions; representatives of the news media; and all other requesters. The Act prescribes specific levels of fees for each category:

(1) <u>Commercial use requesters</u>.

- (i) For commercial use requesters, FmHA shall assess charges which recover the full direct costs of searching for, reviewing for release, and duplicating the records sought. Commercial use requesters are not entitled to the free search time or duplication referenced in paragraph (a)(1) of this section. FmHA may recover the cost of searching for and reviewing records for commercial use requesters even if there is ultimately no disclosure of records.
- (ii) A commercial use requester is defined as one who seeks information for a use or purpose that furthers the commercial, trade, or profit interests of the requester or the person on whose behalf the request is made. In determining whether a requester properly belongs in this category, FmHA must determine whether the requester will put the documents to a

commercial use. Where there is reasonable cause to doubt the use to which a requester will put the records sought, or where that use is not clear from the request itself, FmHA may seek additional clarification from the requester.

(2) <u>Educational and non-commercial scientific institution requesters</u>.

- (i) Fees for this category of requesters shall be limited to the cost of providing duplication service alone, minus the charge for the first 100 reproduced pages. No charge shall be made for search or review services. To qualify for this category, requesters must show that the request is being made as authorized by and under the auspices of an eligible institution and that the records are not sought for a commercial use, but are sought in furtherance of scholarly research (if the request is from an educational institution) or scientific research (if the request is from a non-commercial scientific institution).
- (ii) The term "educational institution" refers to a preschool, a public or private elementary or secondary school, an institution of graduate higher education, an institution of undergraduate higher education, an institution of professional education, and an institution of vocational education, which operates a program or programs of scholarly research.
- (iii) The term "non-commercial scientific institution" refers to an institution that is not operated on a "commercial" (see paragraph (b)(l) of this section) basis, and which is operated solely for the purpose of conducting scientific research, the results of which are not intended to promote any particular product or industry.

(3) Requesters who are representatives of the news media.

(i) Fees for this category of requester shall also be limited to the cost of providing duplicating service alone, minus the charge for the first 100 reproduced pages. No charge shall be made for providing search or review services. Requests in this category must not be made for a commercial use.

- (ii) The term "representative of the news media" refers to any person actively gathering news for an entity that is organized and operated to publish or broadcast news to the public. The term "news" means information that is about current events or that would be of current interest to the public. Examples of news media entities include television or radio stations broadcasting to the public at large, and publishers of periodicals which disseminate news and who make their products available for purchase or subscription by the general public. "Freelance" journalists may be regarded as working for a news organization if they can demonstrate a solid basis for expecting publication through that organization, even though not actually employed by it.
- (4) All other requesters. Fees for requesters who do not fit into any of the above categories shall be assessed for the full reasonable direct cost of searching for and duplicating documents that are responsive to a request. No charge, however, shall be made to requesters in this category for the first 100 duplicated pages, or the first two hours of manual search time, or the equivalent value of computer search time as defined in paragraph (d)(l)(ii) of this section.
- (c) <u>Fee waivers and reductions</u>. FmHA shall waive or reduce fees on requests for information if disclosure of the information is deemed to be in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government, and is not primarily in the commercial interest of the requester.
 - (1) In determining when fees shall be waived or reduced, the following six factors should be considered:
 - (i) The subject of the request, i.e., whether the subject of the requested records concerns "the operations or activities of the government."
 - (ii) The informative value of the information to be disclosed, i.e., whether the disclosure is "likely to contribute" to an understanding of government operations or activities.

- (iii) The contribution to public understanding of the subject by the general public is likely to result from disclosure, i.e., whether disclosure of the requested information will contribute to "public understanding."
- (iv) The significance of the contribution to public understanding. i.e., whether the disclosure is likely to contribute "significantly" to public understanding of government operations or activities.
- (v) The existence and magnitude of a commercial interest, i.e., whether the requester has a commercial interest that would be furthered by the requested disclosure; and, if so.
- (vi) The primary interest in disclosure, i.e., whether the magnitude of the identified commercial interest of the requester is sufficiently large, in comparison with the public interest in disclosure, that disclosure is "primarily in the commercial interest of the requester," in which case, FmHA shall not waive or reduce the fee.
- (2) FmHA may, at its discretion, waive or reduce fees associated with a request for disclosure regardless of whether a waiver or reduction has been requested if the Agency determines that disclosure will primarily benefit the general public.
- (3) FmHA may also waive or reduce fees under the following conditions:
 - (i) Where the furnishing of information or a service without charge or at a reduced rate is an appropriate courtesy to a foreign country or international organization, or where comparable fees are set on a reciprocal basis with a foreign country or an international organization.
 - (ii) Where the recipient is engaged in a nonprofit activity designed for the public safety, health, or welfare.

- (iii) Where it is determined that payment of the full fee by a State or local government or nonprofit group would not be in the interest of the program involved.
- (4) Fees shall be waived, however, without discretion in all circumstances where the amount of the fee is \$25.00 or less.
- (d) Types of services for which fees may be charged.
- (1) <u>Search services</u>. Search services are services of Agency personnel-clerical or supervisory/professional salary level--used in trying to find the records sought by the requester. They include time spent examining records for the purpose of finding information which is within the scope of the request. They also include services to transport personnel to places of record storage, or records to the location of personnel for the purpose of the search, if such services are reasonably necessary. Because of the nature of FmHA's business and records, the normal location of a record in a file or other facility will not be considered a search. This would be the same as quickly locating a piece of material for purposes of answering a letter or telephone inquiry, and is based on the Agency's obligation to respond to requests furnishing a reasonably specific description of the record. "Search" is distinguished, however, from "review" of material to determine whether materials are exempt from disclosure.
 - (i) <u>Manual searches</u>. Manual searches shall be charged for in one of the two following manners in the given order:
 - (A) When feasible, at the salary rate of the employee conducting the search, plus 16 percent of the employee s basic pay; or
 - (B) Where a homogeneous class of personnel is used exclusively, at the rate of \$10.00 per hour for clerical time, and \$20.00 per hour for supervisory or professional time. Charges should be computed to the nearest quarter hour required for the search.

- (ii) <u>Mainframe computer searches</u>. Mainframe computer searches and services shall be charged for at the rate of \$27.00 per minute, or at the rates established in the Users Manual or Handbook published by the computer center at which the work will be performed. Searches using computers other than mainframes shall be charged for at the manual search rate.
- (iii) <u>Unsuccessful searches</u>. Charges for unsuccessful searches, or searches which fail to locate records or which locate records which are exempt from disclosure, shall be assessed at the same fee rate as searches which result in disclosure of records.
- (2) Review services. Review services are services performed by Agency personnel, clerical or supervisory/professional, in examining documents located in response to a request that is for a commercial use, as specified in paragraph (b)(l) of this section, to determine whether any portion of any document located is permitted to be withheld. Review services include processing any documents for disclosure, e.g., doing all that is necessary to excise exempt portions and otherwise prepare documents for release. "Review" does not include time spent resolving general legal or policy issues regarding the application of exemptions. The fee for providing review services shall be the hourly salary rate (i.e., basic pay plus 16 percent) of the employee conducting the review to determine whether any information is exempt from mandatory disclosure.
- (3) Other direct costs. Costs incurred, e.g., manually creating records by compiling information, computer programming, computer runs, shipping records from one office to another by commercial carrier in order to timely answer the request, will be assessed the requester based on actual cost to the Government.
- (4) Authentification (with USDA seal affixed). An additional charge of \$10.00 for each document copy authenticated. When a request is received for an authenticated copy of a document which the Agency determines to make available to the requesting party, the Agency shall cause a correct copy to be prepared and sent to the Office of General Counsel (OGC) which shall certify the same and cause the seal of the Department to be affixed, except that the Judicial Officer, or the Hearing Clerk when directed by the Judicial Officer, may authenticate copies of documents in the records of the Hearing Clerk.

- (5) <u>Certifications</u>. An additional charge of \$5 for each certified document copy. The certification should read: "I certify this is a true copy of the original" (with signature and title affixed). The officials authorized to make this certification are the FOIO, State Directors, District Directors, and County Supervisors.
- (6) <u>Staff manual items</u>. A charge of \$.20 for each sheet, if photocopied. FmHA field offices do not stock such materials for public sale, but should such extra materials be available, they may be furnished without charge.
- (7) <u>Mailing list service</u>. A mailing list service to individuals and organizations has been established for program regulations. Administrative Notices, and forms. To receive mailing list services, notify the Farmers Home Administration, Assistant Administrator, Finance Office, FC-313, 1520 Market Street, St. Louis, MO 63103, in writing. The letter should indicate the complete mailing address to which the material is to be sent. A check, bank draft, or money order for the full amount of the service desired, made payable to the Treasury of the United States, should accompany the letter. Public and nonprofit organizations must include evidence of their status to qualify for the reduced annual subscription rate. Each year a renewal notice will be mailed to all subscription the first week in December. To continue to receive the subscription services without a break, full payment for the next calendar year must be sent to the address in this paragraph not later than December 20th. The subscription charges established are as follows:
 - (i) \$250 for the complete set of program regulations. Administrative Notices, and forms.
 - (ii) \$40 per year for public and nonprofit organizations to receive new regulations and forms, amendments to existing regulations and forms, and new Administrative Notices. This charge is for a calendar year or any part thereof.
 - (iii) \$75 per year for individuals and groups, other than public and nonprofit organizations, to receive new regulations and forms, and new Administrative Notices. This charge is for a calendar year or any part thereof.

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- (8) Forms (blank copies). A charge of \$.20 for each copy. Accountability form items (such as identification cards, transportation requests, and so forth) will not be made available. Only one copy of a blank form shall be supplied. Additional copies of a blank form may be reproduced by the requester using other sources of reproduction.
- (9) Farm Family Record Book (Form RD 432-1). A charge of \$5 per book (43 pages).
- (10) Passive solar home plans. A charge of \$5 per set (8 sheets).
- (11) Manual of Acceptable Practices (MAP 4930.1, 1983 edition). A charge of \$20 per copy. Field offices will take orders and checks, complete Form RD 021-1, "Request for Procedure," for the number of prepaid copies, and send to the FmHA Finance Office, 1520 Market Street, St. Louis, MO 63103. The Finance Office will send the number of prepaid copies to the requesting office and the requesting office will make the MAP available to the purchaser.
- (12) <u>Computer-generated reports</u>. Several computer programs have been developed to provide reports containing releasable data that are frequently requested under the FOIA and are subject to fee charges for the reimbursement of FmHA cost. The most common computer reports and their fee schedules are as follows:
 - (i) <u>B&I Closed Active Loan Lender Report</u>. This report provides a listing of B&I closed loans in state sequence reflecting lender name, town, and tax identification number as well as total number and amount of loans by lender. The data is available from the Rural Community Facility Tracking System (RCFTS).

 State Report \$50.00
 Nationwide Report \$350.00
 (Renumbered 5-31-89, PN 109)
 - (ii) <u>B&I Borrower and Lender Information Report</u>. This report provides a listing of B&I loans in state sequence reflecting borrower name, town, loan amount by type of assistance, interest rate, type of intererest, maturity period

and loan status, as well as lender name, type, town and state. The data is available from the RCFTS.

State Report - \$150.00
Nationwide Report - \$650.00
(Renumbered 5-31-89, PN 109.)

(iii) <u>B&I Job Information Report</u>.

This report provides an alphabetical listing of B&I loans by borrower name in state sequence, reflecting loan amounts, loan status, operational date, jobs created, jobs saved, total jobs, jobs verified, and date verified. The data is available from the RCFTS.

State Report - \$75.00 Nationwide Report - \$500.00 (Renumbered 5-31-89, PN 109.)

(iv) <u>B&I Loan Status Summary Report</u>.

This report provides a listing of B&I loans in state sequence reflecting borrower name and location, fund request, status code and date, amount of assistance, and lender name, town, and state. The data is available from the RCFTS Tracking System. State Report - \$75.00

Nationwide Report - \$500.00 (Renumbered 5-31-89, PN 109.)

(v) <u>B&I Loans Obligated By Year</u>.

This report provides a listing of B&I loans obligated within a specified time frame within a fiscal year in state sequence, which reflects borrower name and location, amount of assistance, and lender name, town, and state. The data is available from the RCFTS Tracking System.

Nationwide Report - \$35.00
(Renumbered 5-31-89, PN 109.)

(vi) <u>List of Obligated/Unclosed Accounts</u>.

This report is a listing of obligated/unclosed accounts sorted by geographic state/county and may be limited to selected loan programs (fund code). The report includes information on interest rate, date of obligation, amount of obligation, and amount vouchered.

Note: Individual borrower data will no longer be released. Loan-related information without an individual borrower

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name, or other identifying information (e.g., social security number, home telephone number, home address), may be released when grouped by geographic or other statistical categories, unless the FOIA requester will be able to identify the name of the individual borrower from the information provided. Loan-related information retrieved by a commercial business name is not affected by this change.

County Report - \$75.00

State Report - \$125.00

Nationwide Report - \$400.00

(Revised and renumbered 06-24-91, SPECIAL PN.)

(vii) Guaranteed Loans Lender Listing.

This report is a listing of all active lenders in loan type and State Office sequence. The report shows the lender's name and address and the total amount of the lender's active loans. State Report - \$75.00 Nationwide Report - \$350.00 (Renumbered 06-24-91, SPECIAL PN.)

(viii) Community Facilities Report by Applicant Type. This report provides an alphabetical listing of Community Facility loans segregated by Public Body and Non-Profit Corporation in state sequence. The report shows borrower name, facility location, purpose of funds, funds borrower contributed, jobs created, jobs saved, population, median income, interest rate, and amount of funds and date obligated. The report also includes fund amounts contributed by the Environmental Protection Agency (EPA), private commercial, state/county, Regional Commission, and other sources. The data is available from the RCFTS.

State Report - \$50.00
Nationwide Report - \$500.00
(Renumbered 06-24-91, SPECIAL PN.)

(ix) Water and Waste Report by Applicant Type.

This report provides an alphabetical listing of Water and Waste loans segregated by Public Body and Non-Profit Corporation in state sequence. The report shows borrower name, facility location, purpose of funds, funds borrower contributed, user residential, user non-residential, user grant benefited, population, median income, interest rate, and amount of loan and grant funds and date obligated. The report also includes fund amounts contributed by the EPA, private commercial,

state/county, Regional Commission, and other sources. The data is available from the RCFTS. State Report - \$50.00 Nationwide Report - \$500.00 (Renumbered 06-24-91, SPECIAL PN.)

(x) <u>List of Borrower Accounts</u>.

This report is available with options to select all insured borrower accounts or specific program accounts, e.g., Farmer Program borrower accounts, Rural Housing borrower accounts or Community Program borrower accounts. Accounts may also be selected for the nation, state, or county. The report is sorted by geographic state/county and can be specified by a period of time based on date of loan. The report shows loan type, loan number, interest rate, and a date and amount of loan.

Note: Individual borrower data will no longer be released. Loan-related information without an individual borrower name, or other identifying information (e.g., social security number, home telephone number, home address), may be released when grouped by geographic or other statistical categories, unless the FOIA requester will be able to identify the name of the individual borrower from the information provided. Loan-related information retrieved by a commercial business name is not affected by this change.

(Revised and renumbered 06-24-91, SPECIAL PN.)

(A) Farm, Housing, or Community Program Borrower Accounts.

County Report:

Farm or Housing - \$100.00 Community Program - \$150.00

State Report:

Farm or Housing - \$200.00 Community Program - \$250.00

Nationwide Report:

Farm or Housing - \$1,000.00 Community Program - \$750.00

(B) All Borrower Accounts

County Report - \$150.00 State Report - \$300.00 Nationwide Report - \$2,500.00

(xi) <u>Computer Run Data Tapes with Specifications</u>. (Renumbered 06-24-91, SPECIAL PN.)

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(A) Farm, Housing, or Community Program Borrower Accounts Data Tape.

This computer data tape produces the same report as described in paragraph (d)(12)(x)(A) of this section.

State Data Tape:

Farm or Housing - \$150.00 Community Program - \$200.00 Nationwide Data Tape: Farm or Housing - \$400.00 Community Program - \$500.00

(B) All Borrower Accounts Data Tape

This computer data tape produces the same report as described in paragraph (d)(12)(x)(B) of this section. State Data Tape - \$250.00

Nationwide Data Tape - \$800.00

(C) Rural Community Facilities Tracking System (RCFTS) Profile

Data Tape.

This computer data tape contains a flat file that can be used with the language of your choice to perform ad hoc analyses and reports. All data shown in reports outlined in paragraphs (d)(12)(i), (ii), (iii), (iv), (v), (viii), and (ix) of this section, is derived from this data tape.

State RCFTS Data Tape - \$100.00 Nationwide RCFTS Data Tape - \$300.00

(D) Guaranteed Loan Lenders Data Tape .

This computer data tape produces the same report as outlined in paragraph (d)(12)(vii) of this section. State Data Tape - \$50.00

Nationwide Data Tape - \$250.00

- (13) <u>Photocopies, 8 1/2" x 14" or smaller</u>. A charge of \$.20 for a single page only if done for the convenience of the requester. No fee will be charged for photocopying done for the convenience of the Government or when the requester provides the copying equipment, materials, and services.
- (14) <u>Photocopies in excess of 8 1/2" x 14"</u>. A charge of \$.50 per linear foot of the longest side of the copy or portions thereof only if done for the convenience of the requester. No fee will be charged for photocopying done for the convenience of the Government or when the requester provides the copying equipment, materials, and services.

- (15) <u>Audio and videotape reproductions</u>. For reproductions of audio or videotapes, requesters must supply their own recording tape, and will be assessed a fee of \$25.00 an hour for copying work requested. There is a one-hour minimum charge. Payment is required at the time videotapes or audiotapes are accepted by the requester.
- (16) <u>Photographic reproductions of FmHA-owned microfiche</u>. A charge of \$3.50 for the first fiche image and \$1.00 for each additional fiche image will be assessed for photographic reproductions of FmHA-owned microfiche.

(e) Payments of fees and charges.

- (1) Payments should be billed for the fullest extent possible at the time the requested materials are furnished. Payments should be made by requesters within 30 days of the date of the billing. Payments shall be made by check, draft, or money order made payable to the Treasury of the United States, although payments may be made in cash, particularly where services are performed in response to a visit to the office.
- (2) Where the estimated fees to be charged exceed \$250.00. FmHA may require an advance payment of an amount up to the full estimated charges (but not less than 50 percent) from the requester before any of the requested materials are reproduced. In instances where a requester has previously failed to pay a fee, FmHA may require the requester to pay the full amount owed, as well as the full estimated fee associated with any new request, before the Agency begins to process that new or subsequent request. (Revised 12-28-88, PN 100)
- (3) When the fee is collected, a receipt will be issued to the payer on Form RD 104-1, "Public Information Transmittal and/or Receipt." Collections received along with a transmittal explaining the proper disposition of the funds should be sent to:

Department of Agriculture Administrative Collections P.O. Box 70792 Chicago, Illinois 60673

Lock box personnel at the First National Bank of Chicago will deposit the remittance and forward a photocopy of the check(s) with all supporting documentation via Express Mail to the USDA, National Finance Center. (Revised 12-28-88, PN 100)

(f) <u>Effect of the Debt Collection Act on Fees</u>. In attempting to collect fees levied under the FOIA, FmHA shall abide by the provisions of the Debt Collection Act of 1982 (P.L. 97-365) in disclosing information to consumer reporting agencies and in the use of collection agencies, where appropriate, to encourage payment.

(g) <u>Deficiencies and refunds</u>.

- (1) When the amount covered by an advance payment is less than the final total cost of filling a request, the amount of the deficiency, if \$1 or more, will be collected not later than at the time the request is filled. Overpayment of \$1 or more will be refunded, but refunds of amounts less than \$1 will not be made unless specifically asked for in writing.
- (2) When a check is passed for which there is to be a full or partial refund, explain the situation, state the check amount, how the check is to be made out, the address it is to be sent, and send to:

USDA, National Finance Center Head, Administrative Billings and Collections P.O. Box 60950 New Orleans, LA 70160

§2018.256 Public inspection and copying.

- (a) Facilities for inspection and copying by the public and for obtaining copies of materials will be provided by the FOIO in the National Office, the State Director in each State Office, the District Director in each District Office, and the County Supervisor in each County Office. Such facilities will usually consist of a table and chairs in a convenient location in an office which can be used without undue interference with normal office procedure.
- (b) A person who has requested such materials will be promptly notified that he/she may inspect and copy such materials and, upon payment of applicable fees, obtain copies thereof on business days during regular business hours. If any of the FmHA materials requested are not located at the office to which the request was made, the request will be forwarded to the office where such materials are available for a direct reply and the requester so notified. Personal inspection of documents in lieu of copying should be encouraged.

§2018.257 Requests for records.

- (a) To speed processing, requests for information should be made to the appropriate County, District or State Office where the records are likely to be located, but requests may be mailed to the Freedom of Information Officer, Administrative Services Division, Farmers Home Administration, Washington, D.C. 20250. Requests for staff manual items, forms, and descriptive publication that are readily available need not be put in writing. The phrase "FOIA REQUEST" should be placed in capital letters on the front of the envelope for any written requests. The requester will be given the information promptly and in writing. When a determination to release has been made, but the information to be furnished cannot be given promptly, the requester will be given a written notice indicating when the information will be available.
- (b) All written requests will be date stamped upon their receipt.
- (c) No provision in 5 U.S.C. 552 requires that an agency compile a new record in order to fulfill a request for records. Such compilation may be undertaken voluntarily if the Agency determines this action to be in the public interest or in the interest of FmHA.

- (d) A request shall not be denied on the sole ground that the record has not been properly identified if the description, together with the knowledge Agency personnel have of the contents of their files, enables the record to be located.
- (e) A request relating to a matter in pending litigation should indicate the name of the court and its address.
- (f) Requests shall be reasonably specific. If they fall within reasonably specific categories, but constitute an undue burden, the FmHA official making the determination may contact the requester to discuss the request and attempt to reduce it to manageable proportions. However, the fact that filling a request constitutes an undue burden is not grounds for denying a request.
- (g) A single copy of any document or blank form will be supplied whenever possible. Copies of forms provided to the public shall also be limited to one copy per form. Persons requiring any large quantities should be encouraged to use other sources for reproduction. If photocopies must be made, the FmHA employee will maintain control of partially exempt documents being copied to eliminate unauthorized disclosure of material.
- (h) If data have been compiled and are available in the form of a record, the data shall be made available as provided herein. If administratively feasible, records may be created for the prescribed fee; however, records are not normally required to be created by compiling selected items from the files, and records are not normally required to be created to provide the requester with such data as ratios, proportions, percentages, per capitas, frequency distributions, trends, correlations, comparisons, and forecasts.
- (i) Copies of a requested record need not be furnished if the record is known to have been published in the Federal Register or is available for purchase from the Superintendent of Documents of GPO. The requester will be advised to order from GPO at the following address: Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402. Such records may be furnished if an agency office has a copy. A requester may purchase a complete set of RD Instructions from GPO by asking for Title 7 CFR Parts 1500 to end.

- (j) If the material requested is the primary concern of another agency, the requester may be informed of that fact and asked to contact the other agency. If the requester insists that FmHA provide the information, FmHA must process the request and can deny access only on the basis of the FOIA exemptions. If FmHA has no knowledge concerning the requested records, it shall notify the requester of that fact.
- (k) Records of specified form or character are required to be destroyed after the lapse of time specified in the Records Disposal Act of 1943, 44 U.S.C. 366-380, and in accordance with FmHA disposal schedules approved by the General Services Administration. Under no circumstances shall records be destroyed while they are the subject of a pending request, appeal, or lawsuit under the FOIA or the Privacy Act. When final action has been taken on these requests such materials may be destroyed in accordance with Schedule 14, General Records Schedule, FPMR 101-11.4.

§2018.258 Availability of identifiable material.

(a) <u>Information subject to mandatory release</u>.

- (1) The FOIA authorizes agencies to disclose information that "is in the public interest because furnishing the information can be considered as primarily benefiting the general public." The applications of a public interest often requires a balancing of the individual's right of privacy against the preservation of the basic purpose of FOIA to open agency action to the light of public scrutiny. Thus, there is a sound basis in both logic and law for agencies to focus on any public interest served by nondisclosure, to determine the "net" public interest involved, and to determine whether perhaps any public interest factors favoring disclosure are outweighed by the very significant and tangible public interest factors favoring nondisclosure. Examples of public interest assertions by requesters to obtain Agency records are as follows:
 - (i) Public scrutiny of Agency records dealing with controversial political issues or to disclose the "Secret Law" of an agency.
 - (ii) Ensure Agency performance of statutory responsibilities or to expose possible Government wrongdoing.

- (iii) Obtain Agency records for use of investigative reporters of the news media.
- (iv) Obtain Agency records for use in historical work or academic studies.
- (v) Obtain Agency records for use by public interest groups or for use in consumer group activities.
- (vi) Discover evidence for use in adjudicatory proceedings before an Agency or to discover evidentiary basis for Agency rulemaking in order to challenge that rulemaking.
- (2) The FOIA's broad disclosure mandate is subject to nine exemptions which are to be construed narrowly. The exemptions are permissive in nature and the Agency generally may disclose exempt information unless it is under a legal duty arising outside of FOIA not to disclose. Examples of information subject to mandatory release are as follows:
 - (i) RD Instructions, AN's, unnumbered letters, blank copy of forms, descriptive publications, and the like.
 - (ii) Statistical data in any form.
 - (iii) Final Agency opinions, decisions and actions, including contract awards and bid abstracts, unless such opinions, decisions, and actions contain information which clearly constitutes an unwarranted invasion of personal privacy, in which case such materials must be redacted.
 - (iv) Pleadings, motions, orders, testimony, and other documentary evidence introduced in pending or closed litigation once such items are a matter of public record. (Renumbered 10-20-93, PN 214.)

- (v) Information available in public records, or customarily released by the applicant or recipient, or approved in writing for release by the applicant or recipient to whom the records pertain. (Renumbered 10-20-93, PN 214.)
- (vi) Names of past and present employees' position titles, occupational series, grades, duty stations, and salaries, including performance bonuses, awards, meritorious or distinguished executive ranks, and allowances and differentials. (Revised 09-04-96, PN 265.)
- (vii) Employees' position descriptions, job elements and those performance standards, but not actual performance appraisals, that the release of which would not interfere with law enforcement programs or severely inhibit Agency effectiveness. Performance elements and standards or work expectations may be withheld when they are so intertwined with performance appraisals that their disclosure would reveal an individual's performance appraisal. (Renumbered 10-20-93, PN 214.)
- (viii) SF-278, "Executive Branch Personnel Public Financial Disclosure Report" of Agency employees in Executive Level, Schedule C, and SES positions. (Renumbered 10-20-93, PN 214.)
- (b) Information subject to consultation with the FOIO.
 - (1) The following information about an individual applicant or borrower requested by third parties will not be released until after consultation with the FOIO:
 - (i) Applications, family budgets, and Farm and Home Plans containing personal and financial data such as an identity of an employer, education level, and detailed representation of income, debts, living expenses, and financial statements.
 - (ii) Credit reports and references.
 - (iii) Character reference letters.
 - (iv) Verification of income or employment.

- (v) Appraisals and inspection reports.
- (\mbox{vi}) Audits, OGC opinions, and investigatory or law enforcement records.
- (vii) Inter-agency or intra-agency documents of a predecisional and deliberative nature containing opinions and recommendations prior to a final decision.
- (viii) Solicited or unsolicited information given the Agency under an expressed "promise of confidentiality."
- (2) The following information about a business or public entity will not be released to third parties until after consultation with the FOIO:
 - (i) Contract proposals and their evaluation.
 - (ii) RH 515 project market surveys performed by a private commercial business.
 - (iii) Personal financial statements of officers, stockholders, etc., or their personal history.
 - (iv) Business appraisals and liquidation plans.
 - (v) Acquisition offers to purchase business.
 - (vi) Dunn and Bradstreet financial reports.
 - (vii) Financial and market surveys, projections and operating budgets.
 - (viii) Appraisals of personal property pledged by guarantors.

- (ix) Inter-agency or intra-agency documents of a predecisional and deliberative nature containing opinions and recommendations prior to a final decision.
- (x) Product pricing and unique manufacture processes, procedures, and techniques.
- (xi) Solicited or unsolicited information given FmHA under an expressed "promise of confidentiality."
- (c) <u>Legal basis for withholding information (exemptions from disclosure)</u>. The Agency cannot refuse to provide records to a requester because of the identity of the requester or the requester's purpose in seeking the records. It can refuse to make the requested records available only when the records sought fall within at least one of the nine statutory exemptions from the FOIA's disclosure provisions.
 - (1) <u>General</u>. There are six specific statutory exemptions most applicable to documents in the possession of FmHA. These statutory exemptions, with their appropriate citations, are as follows:
 - (2) <u>5 U.S.C. 552 (b)(2)</u>. Records "related solely to the internal personnel rules and practices of an agency." This exemption covers:
 - (i) internal matters of a relatively trivial nature in which there is no genuine public interest; and
 - (ii) more substantial internal matters the disclosure of which would allow circumvention of a statute or regulation. Exemption No. 2 of the FOIA 15 U.S.C. 552 (2)].
 - (3) 5 U.S.C. 552 (b)(3). Matters which are "specifically exempted from disclosure by statute, (other than section 552b of [Title 5]), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of material to be withheld." Exemption No. 3 of the FOIA [5 U.S.C. 552 (b)(3)].

- (i) It has been determined that the Privacy Act (5 U.S.C. 552a) and the Trade Secrets Act (18 U.S.C. 1905) are not appropriate 5 U.S.C. 552 (b)(3) statutes.
- (ii) Internal Revenue Service tax code (26 U.S.C. 6103) "Confidentiality and disclosure of tax returns and tax return information" is an appropriate 5 U.S.C. 552 (b)(3) statute.
- 5 U.S.C. 552 (b)(4). "Trade secrets and commercial or financial information obtained from any person and privileged or confidential." This exemption does not itself preclude discretionary disclosure of business information unless, however, the Trade Secrets Act (18 U.S.C. 1905) prevents such discretionary disclosure. This exemption covers material which would not customarily be made public by the person from whom it was obtained. Requested records will be considered "confidential" within the meaning of this exemption if their disclosure is likely to either (1) impair the government's ability to obtain necessary information in the future, or (2) cause substantial harm to the competitive business position of the person or the business on which the information was supplied. A pledge of confidentiality from the Agency, or the fact that the information at issue is not customarily available to the public, will not qualify requested materials as "confidential" under this exemption. FmHA is responsible for making the final determination with regard to the disclosure or nondisclosure of information submitted by a business. If it cannot be readily determined whether the information obtained from a person is privileged or confidential business information, it is the policy of FmHA to obtain and consider the views of the submitter of the information, and to provide the submitter an opportunity to object to any decision to disclose the information. Whenever a request (including any "demand" as defined in §2018.260 of this subpart) is received for information which has been submitted by a business, FmHA shall:
 - (i) Provide the business information submitter with prompt notification of a request for that information (unless it is readily determined by the Agency that the information requested should not be disclosed or, on the other hand, that the information is not exempt by law from disclosure).
 - (ii) Notify the requester that FmHA will inform the submitter of a request for submitted business information.

- (iii) Afford business information submitters time in which to object to the disclosure o, any specified portion of the information. The submitter must explain fully all grounds upon which disclosure is opposed. For example, if the submitter maintains that disclosure is likely to cause substantial harm to its competitive position, the submitter must explain document-by-document and item-by-item why disclosure would cause such harm. Information provided by a business submitter pursuant to this paragraph may itself be subject to disclosure under FOIA. The unique nature of this exemption applies particularly to contract proposals, market surveys, and business appraisals. The Agency rarely denies business information without first consulting the business information submitter and in most cases requires their justification for FmHA to exercise this exemption. The following contains specific guidance from the Office of General Counsel (OGC) on what FmHA should demand from the business regarding their justification for our assertion of this exemption:
 - (A) Please review your copies of the requested documents to determine whether any portion of them is covered by an exemption to the FOIA. If any information in these documents was supplied by others, please ascertain whether any third parties have an objection to the release of the documents. Absent advice to the contrary, the FmHA will presume that such third parties have been informed of this FOIA request and/or have no objection to release.
 - (B) All objections to release must be stated in terms of exemptions from release of documents provided in the FOIA itself or Department of Agriculture regulations (7 CFR 1.1 1.23). Statements of objections must apply to specific documents and parts thereof. Statements of broad objection to release of all documents requested will not be viewed as appropriate.
 - (C) In general, where some portions of a document are exempt from mandatory release and some portions are not, all nonexempt portions are to be released. Those portions not released are to be identified according to the nature of the information contained and the specific applicable exemption or exemptions. You should indicate which portions of documents (if any) are considered exempt from mandatory release. If these are approved, the remainder of the document can then be released.

- (D) The criteria for properly invoking an exemption under 5 U.S.C. 552 (b)(4) requires establishing that: (1) The information is confidential; (2) Actual competition exists; and (3) Substantial competitive harm is likely to result from disclosure. Any commercial or financial information considered privileged or confidential must be identified with particularity.
- (E) To withhold information, FmHA needs an affidavit(s) to support any claimed exemptions. Such an affidavit(s) should address in detail and nonconclusory terms, inter alia, the following series of questions. While some questions may not be applicable to the situation, they are provided for your general guidance and as an indication of the quality and type of information that must be received in support of a 5 U.S.C. 552(b)(4) exemption claim.

(1) Confidentiality.

- (\underline{i}) Does your firm continue in the same or substantially similar business to which the commercial or financial information is relevant?
- (\underline{ii}) How would divulging each item of commercial or \overline{fin} ancial information reveal the basis or method of operation of your business?
- $(\underline{\text{iii}})$ Due to the age of the information, what information remains to be of continued commercial vitality and value?
- (\underline{iv}) Are any subcontractors listed in the subject documents currently associated with your business? Is all commercial or financial information associated with any such subcontractors current?
- (v) How would disclosure of the information affect the Government's ability to obtain similar data from your firm in the future?

- (2) Existence of competition.
 - (\underline{i}) Describe the current market in which your business is involved.
 - $(\underline{\text{ii}})$ Who are successful businesses involved in the market described above?
 - (\underline{iii}) Please indicate the specifics of how the information will harm your competitive position as a result of disclosure to the requester.
- (3) Substantial competitive injury.
 - (\underline{i}) Describe the nature of your business and how particular commercial or financial information could be used by a competitor to your injury.
 - (\underline{ii}) Would release of the information allow competitors advantageous insight into your firm's business operations? If so, in what way?
 - (\underline{iii}) Could a competitor construct a theoretical model of your firm's cost and profit?
- (F) The affidavit(s) should not be limited to a narrative response to the above questions. All information related to the issue of confidentiality and competition should be included. The responses should be precise, detailed, and address, so far as possible, each item of commercial or financial data individually. Any requests for which the remaining eight exemptions apply should be stated and expressed in a similar manner.
- (G) The FOIA imposes strict time limits on Government agencies. In view of those limits, any objection to release of the above referenced documents is expected within fifteen days of your receipt of this letter. Failure to receive any objections within that time will

objections within that time will be construed as an absence of objection to release to the requester. If there is no objection to release, a statement to that effect will be appreciated and will speed the response to the requester.

- (iv) Provide business information submitters with notice of any determination to disclose such records prior to the disclosure date, in order that the matter may be considered for possible judicial intervention. Exemption 5 U.S.C. 552(b)(4) cases often give rise to so-called "Reverse FOIA" actions, in which the submitter of the requested materials seeks judicial intervention to prevent the Agency from releasing business information to the requester.
- (v) Notify business information submitters promptly of all instances in which FmHA FOIA requesters bring suit seeking to compel disclosure of submitted information. Exemption No.4 of the FOIA $[5\ U.S.C.\ 552\ (b)(4)].$
- (5) <u>5 U.S.C. 552 (b)(5)</u>. "Inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." This exemption protects internal memorandums and letters of a predecisional and deliberative nature, the release of which would inhibit the free exchange of ideas within FmHA prior to a final decision. It cannot be used to withhold material merely because it is embarrassing or to withhold purely factual material or final decisions. Exemption No. 5 of the FOIA [5 U.S.C. 552 (b)(5)].
 - (i) Included within the scope of this exemption is the "executive" privilege (protecting advice, recommendations, and opinions which are part of the deliberative, consultative, decision-making processes of government), the attorney "work-product" privilege (protecting documents prepared by an attorney in anticipation of particular proceedings, where disclosure would reveal the attorney's litigation strategy or theory of the case), and the "attorney-client" privilege (protecting confidential communications between an attorney and his client).

- (ii) The "executive" privilege, is the most frequently encountered application of this exemption by FmHA. Predecisional versus post-decisional, and fact versus opinion are unique distinctions of this exemption. Courts have held that pre-decisional recommendations, which would ordinarily be exempt, lose the protection of the "executive, privilege if an agency, in making a final decision, chooses expressly to adopt them or incorporate them by reference. Conversely, facts that would ordinarily be available to the public have been withheld where they are selected or summarized in a way that reflects the deliberative process, or where their disclosure would impair the Agency's ability to obtain information which is essential to the Agency's decision-making process.
- (iii) Rarely does this exemption apply to an entire document, requiring instead that the Agency delete only those parts which are exempt from mandatory disclosure. The FOIA states that an agency may not withhold an entire document because some portion of its contents is exempt from disclosure. This is particularly true of running case records, problem case reports, and the like.
- (6) 5 U.S.C. 552 (b)(6). "Personnel and medical files and similar files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." This exemption excludes from disclosure requirements all personnel and medical files and all private or personal information contained in other files which, if disclosed to the public, would amount to a clearly unwarranted invasion of personal privacy. FmHA interprets "person" to include only individuals and "files" to include personnel files and loan and grant files. This exemption does not include FmHA personnel's grade, title, salary, and work location. Personal information which would not be available by law to a third party may be released if a written authorization to do so is granted by the first party waiving provisions of the Privacy Act of 1974. (Exhibit D of RD Instruction 2015-E may be used for this purpose). Exemption No. 6 of the FOIA [5 U.S.C. 552 (b)(6)]. (Revised 10-20-93, PN 214.)
 - (i) This exemption requires agencies and courts to balance individual privacy interests against the public's right to information. Although courts have noted that the language of the exemption appears to tilt the balance in favor of disclosure, information which

reveals "intimate" or "personal" details concerning a living person can be withheld where the privacy interest is balanced against little or no public interest in disclosure.

- (ii) Examples of less commonly known documents meeting the conditions of this exemption notwithstanding a public interest are as follows:
 - (A) Intimate or personal details about individuals beyond those described in $\S2018.258(a)(2)(vi)$ and (vii) of this subpart, regarding garnishment of wages on alimony orders and child support, except when requested by State and local government officials authorized to issue compulsory requests for information. (Revised 10-20-93, PN 214.)
 - (B) Performance Appraisals—Performance elements and standards may also be withheld when they are so intertwined with performance appraisals that their disclosure would reveal an individual's performance appraisal.
 - (C) SF-450, "Executive Branch Personnel Confidential Financial Disclosure Report" -- The Agency shall hold each Confidential Financial Disclosure Report in confidence. Only designated employees authorized to review and retain the reports are responsible for maintaining the reports in confidence, and shall not allow access to or allow information to be disclosed from a report. (Revised 09-22-93, PN 213.)
 - (D) Segregated, selective, or discriminate list of individual borrowers such as delinquent loans, borrowers receiving servicing letters, borrowers names submitted to collection agencies, and borrowers facing foreclosure, bankruptcy, or the like. Such a request for information regarding individuals debt servicing relationship with the Agency must be denied on the basis that individual borrowers have legitimate expectations of privacy regarding their servicing relationship with the Agency, an expectation which the Agency is authorized to maintain under this exemption.

- (7) <u>5 U.S.C. 552 (b)(7)</u>. "Records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information: (A) could reasonably be expected to interfere with enforcement proceedings; (B) would deprive a person of a right to a fair trial or an impartial adjudication; (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy; (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source; (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life or physical safety of any individual." For example, records which divulge Office of Inspector General (OIG) audits and investigative reports, which are to be released only by OIG, may be exempt. Requests for such records should be referred to OIG. Exemption No. 7 of the FOIA [5 U.S.C. 552 (b)(7)].
- (d) <u>Credit reports</u>. Credit reports are to be released to the subject or the subject's designated representative, and to no other party, except for those portions which can be released without causing a clearly unwarranted invasion of personal privacy or under compulsory process.
- (e) Availability of materials and records to other Government agencies.
 - (1) Other USDA Agencies. Release of Information to other USDA agencies on a "need to know" basis may be made as it is not subject to the Privacy Act if such information will be used in the performance of official duties.
 - (2) Other Federal agencies. FmHA desires the fullest cooperation with other Federal agencies. Accordingly, any information that is available to the public or subject to the Privacy Act conditions of disclosure 5 U.S.C. 552a(b), may be made available to other Federal agencies.

(3) State and local governmental agencies. State and local governmental agencies will be treated in the same manner as the general public, except that information which might be withheld from a member of the general public may be released to a State or local governmental agency if such release would be in the public interest (i.e., for use in conducting official surveys). Also, any information that is subject to the Privacy Act conditions of disclosure 5 U.S.C. 552a(b) may be made available to State and local governmental agencies.

§2018.259 Determinations and appeals.

- (a) <u>Determinations</u>. A determination to release or deny must be made within 10 working days after receipt of the request and, upon a determination to grant the request, if the requested data is not enclosed in the reply, the approximate date that compliance will be effected shall be indicated in the reply. If a denial is contemplated, the FOIO should be consulted, especially if the denial is for information with which you are not familiar. The names and titles or positions of each person responsible for the denial of a request must be set forth as a part of the written denial or they must sign the denial. The notice of denial shall specify:
 - (1) the nature of the information being withheld;
 - (2) the reasons for the denial citing the applicable exemption(s) under the FOIA;
 - (3) the right of the requester to appeal the denial to the Administrator of FmHA whose address is: U.S. Department of Agriculture, 14th and Independence Ave. S.W., Washington, D.C. 20250;
 - (4) that appeal should be made in writing within 45 days after receipt of the information being made available; and
 - (5) that the phrase "FOIA APPEAL" is to be placed in capital letters on the front of the envelope containing the appeal.

(b) Appeals.

- (1) The FmHA Administrator will notify the requester in writing, within not more than 20 working days after receiving the written appeal, of the FmHA's final determination. Upon a determination to grant the appeal, if requested data is not enclosed, the requester shall be informed of the approximate date compliance will be effected. Upon a determination to deny the appeal, the Administrator will send a copy of the records requested, when practical, and copies of all related correspondence to the OGC, Attention: Research and Operations Division. When the volume of records is so large as to make sending a copy of the records requested impractical, the Administrator will enclose a representative sample or an informative summary of those records. In accordance with 7 CFR 1.17, FmHA may, in individual cases, except when disclosure is specifically prohibited by Executive Order, statute, or applicable regulations, make available records exempt from mandatory disclosure under 5 U.S.C. 552 (b) whenever it determines that such disclosure would be in the public interest.
- (2) The FmHA Administrator's notice of a final denial will include a statement that judicial review is available in accordance with 5 U.S.C. 552 (a)(4). The notice of final denial will also inform the requester of the reason(s) for the denial and names and titles or positions of each person responsible for the denial of the appeal.

(c) Extension of Administrative deadlines.

- (1) In unusual circumstances administrative deadlines may be extended by an authorized FmHA official pursuant to §2018.252 of this subpart. Written notice of the extension shall be sent to the requester within the applicable deadline setting forth the reasons for such extension and the date a determination is expected to be dispatched. In no event shall the extension exceed a total of 10 working days.
- (2) Nothing in this instruction shall preclude FmHA and the requester from agreeing on an extension of time. Any such agreement shall be confirmed in writing and shall specify clearly the total time agreed upon.

§2018.260 Compulsory process.

- (a) When a subpoena or other compulsory process requires the production or disclosure of any records, materials, or information acquired by an FmHA employee in the performance of his or her official duties, or because of his or her official status, the employee will appear at the time and place required by the subpoena or other compulsory process, and will follow the instructions of the State Director or Administrator regarding the information that may or may not be disclosed. The OGC should also be notified for consultation.
- When access is sought by subpoena, order, or other compulsory process or demand (hereinafter in this section referred to as a "demand") to require the production or disclosure of any record or material which is exempt from disclosure under 5 U.S.C. 552 (b) or information related thereto acquired by an employee in the performance of his or her official duties or because of his or her official status, the matter shall be referred to an official authorized to make releases pursuant to $\S 2018.252$ of this subpart. If such official determines that it would be improper to comply with the demand, he or she shall refer it to the Administrator pursuant to §2018.259 of this subpart. Administrator may authorize release; however, if the Administrator concurs with the initial conclusion, the matter shall be referred to the Secretary through the General Counsel for final determination. If the Secretary determines that the records, material, or information should not be produced, or if no final determination has been made, the employee who appears in answer to the demand will respectfully decline to produce or disclose the records, material, or information demanded on the ground that the disclosure is prohibited by Departmental Regulation 7 CFR 1.21. The employee shall provide the court or other authority with a copy of this instruction and, when available, a copy of the Secretary's determination, and shall respectfully request the court or other authority to withdraw or stay the demand. If the court or other authority declines to stay the effect of the demand in response to a request, pending the receipt by the employee of instructions or directions, or if the court or other authority rules adversely on any assertion made in conformity with the provisions of this instruction, the employee upon whom the demand has been made may tender the records, material, or information demanded with a request that they be held "in camera" until an appeal can be made of the adverse ruling.
- (c) No public statements or press releases relating to particular litigation being conducted by the Department of Justice are to be made or issued without prior consent of the FOIO who will obtain permission from the Research and Operations Division, OGC.

§2018.261 <u>Annual report</u>.

- (a) Each State Director shall submit a report on the following items to the FOIO, General Services Staff, National Office, by January 5th for the previous calendar year. The report is to cover all activity within his or her jurisdiction. The report is to be in narrative form. Items to be contained in the report are as follows: (Revised 10-20-93, PN 214.)
 - (1) Total number of FOIA requests received in calendar year ____.
 - (2) Total number of denials signed in the State, District, or County Offices under your jurisdiction.
 - (3) The legal basis (exemptions invoked) for denial and the number of times invoked.
 - (4) The name and title of the FmHA employee signing each denial letter and the number of letters which he/she denied access.
 - (5) The total amount of fees collected for records supplied.
 - (6) The cost to administer the Act. This would include the
 following: cost of postage, envelopes, white-out, cover-up tape,
 hours spent on FOIA (professional) for calendar year ____ x hourly
 rate of professional = \$_____, and hours spent on FOIA
 (clerical) for calendar year ____ x hourly rate of clerical =
 \$______.
 - (7) Reproduction cost for calendar year _____
 - (8) Copies of any internal memoranda or instructions concerning FOIA, issued by your office, for calendar year _____.
 - (9) The number of any instances in which you took more than 10 working days to fill the requests because of:
 - (i) The need to search for and collect information from the District/County offices;
 - (ii) The need to search for, collect, and examine voluminous records for single requests;
 - (iii) The need for consultations;
 - (iv) Court appeals on exhaustion of procedures because of inability to comply within applicable time limits; and
 - (v) Court-allowed time limits.

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- (10) The number of requests asking for a fee waiver or reduction.
- (11) FOIA Annual Report Cost: Number of hours spent completing this FOIA annual report x hourly rate of the individual(s) who completed this report = \$
- (b) The FOIO in the National Office will:
 - (1) Summarize all State Office reports and include as a part thereof all activities described in paragraph (a) of this section which were confined solely to the National Office.
 - (2) Report the number of appeals made by requesters and the reason (exemptions or authority invoked) for the action taken upon each appeal that resulted in a denial of information. The report shall also indicate the number of appeals granted in full, denied in full, denied in part, or pending, as well as the name and title or position of the person who granted, denied, or partially denied appeals.
 - (3) Report the results of each proceeding conducted with copies of court opinions or orders pursuant to 5 U.S.C. 552 (a)(4)(F), including a separate report of the disciplinary action taken by FmHA against the employee who was primarily responsible for improperly withholding records or an explanation of why disciplinary action was not taken.
 - (4) Provide, with the report, copies of all regulations and procedures regarding rulemaking for the administration of the FOIA.
 - (5) Report such other information that indicates efforts to administer the FOIA, such as:
 - (i) Availability of records.
 - (ii) Cost to administer availability of records.
 - (iii) Compliance with time limitations.
 - (iv) Requesters seeking fee waivers or reductions.
 - (v) Internal memoranda or instructions issued.
 - (6) Submit the complete report to the Office of the Secretary of Agriculture, Attention: Office of Information, Governmental and Public Affairs, by February 1st of each year.

§§2018.262 - 2018.300 [Reserved]

ATTACHMENT: Exhibit A

Exhibit A not automated see manual